No. 18-272

IN THE

Supreme Court of the United States

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,
Petitioner,

v.

AILEEN RIZO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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The Center for Workplace Compliance (CWC) and National Federation of Independent Business Small Business Legal Center (NFIB) respectfully submit this brief *amici curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and

INTEREST OF THE *AMICI CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 240 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents businesses nationwide.

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no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Most of *amici's* members are employers, or representatives of employers, subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended by the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and other federal employment laws and regulations. As representatives of potential defendants to EPA compensation discrimination charges and lawsuits, *amici's* members have a substantial interest in the issue presented in this matter regarding the proper scope of the statute's "any other factor other than sex" affirmative defense. 29 U.S.C. § 206(d)(1). The Ninth Circuit erroneously held that a pay disparity resulting from the application of a facially-neutral system that considers prior salary in setting initial pay is not a "factor other than sex" under the EPA, and thus is unlawful.

As national representatives of businesses and professionals whose responsibilities include compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, CWC and/or NFIB have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals involving significant issues of employment law. Because of their practical experience in these matters, *amici* are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

After relocating to the area from Maricopa County, Arizona, Respondent Aileen Rizo was hired in 2009 to serve as a math consultant for the Fresno County, California Office of Education (County) at an annual salary of $62,733 – $62,133 in base pay plus a master's degree stipend of $600. Pet. App. 5a. Her initial pay was determined using the County's standardized salary schedule known as "standard operation procedure 1440" (SOP 1440), under which management-level employees are placed in the salary level that most closely corresponds to their prior salary, increased by five percent. *Id.* SOP 1440 is entirely gender-neutral and has been applied in a nondiscriminatory manner, resulting in some men, and some women, being paid more than their similarly situated peers. Pet. 3-4.

Rizo lobbied the County for a pay adjustment after learning that a recently-hired male math consultant was placed in a higher salary level. Pet. App. 5a. After conducting an extensive pay analysis of current management employees hired over the past 25 years in the same or similar position as Rizo, the County confirmed that SOP 1440 had been applied consistently and in a nondiscriminatory manner, and that in fact, more females had been placed at higher steps than males. *Id.* It thus declined to adjust Rizo's pay. *Id.*

Rizo was dissatisfied with the County's results, believing that on average, men were placed at a higher level than females. *Id.* She sued the County, claiming that the difference in pay between her and her male peers was unjustified and thus violated the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and Title VII of the Civil

Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. *Id.* at 5a-6a.

The County moved for summary judgment, arguing that Rizo's salary, though admittedly less than her male colleagues, was set in accordance with SOP 1440 and thus was based on "any other factor other than sex." *Id.* at 6a. The County pointed out that application of SOP 1440 was rooted in four sound business reasons: it (1) was objective; (2) encouraged candidates to leave their current jobs by providing a five percent pay increase over their current salary; (3) prevented favoritism and ensured consistency; and (4) was a "judicious use of taxpayer dollars." *Id.* at 58a.

In denying the County's motion for summary judgment, the district court concluded that prior salary alone never can be a factor "other than sex" under the EPA. *Id.* at 84a-85a. It reasoned that "a pay structure based exclusively on prior wages is so inherently fraught with the risk ... that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate nondiscriminatory business purpose." *Id.* at 6a, 84a-85a. Recognizing its apparently direct conflict with binding Ninth Circuit precedent, however, the district court certified its ruling for interlocutory appeal. *Id.* at 6a.

On the County's appeal, a three-judge panel reversed, relying principally on the Ninth Circuit's 1982 decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), *overruled by Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *petition for cert. filed*, No. 18-272 (U.S. Aug. 30, 2018). *Id.* at 6a-7a. There, it held that a pay differential based on use of prior salary can be a permissible "factor other than sex," so long as

it "effectuate[s] some business policy," and is used "reasonably in light of the employer's stated purpose as well as its other practices." *Id.* at 58a. The panel concluded that *Kouba* is dispositive to resolution of this case, pointing out, "We do not agree with the district court that *Kouba* left open the question of whether a salary differential based solely on prior earnings violates the Equal Pay Act. To the contrary, that was exactly the question presented and answered in *Kouba*." *Id.* at 59a. It thus reversed the district court's ruling and remanded the case for a determination on whether the County used prior salary "reasonably in light of its stated purpose." *Id.* at 60a.

Rizo filed a petition for rehearing *en banc*, which the Ninth Circuit granted to "clarify the law" and further assess "the vitality and effect of *Kouba*." *Id.* at 7a. The *en banc* court reversed summary judgment for the County, concluding that a legitimate "factor other than sex" under the Equal Pay Act "must be job related and that prior salary cannot justify paying one gender less if equal work is performed." *Id.* at 13a. It found that "prior salary alone or in combination with other factors cannot justify a wage differential," *id.* at 2a, because in its view, reliance on prior salary would further perpetuate the gender wage gap. Accordingly, because prior salary cannot "constitute a 'factor other than sex,' the County fails as a matter of law to set forth an affirmative defense [to liability under the Equal Pay Act]." *Id.* at 4a. The County filed a Petition for a Writ Certiorari with this Court on August 30, 2018. *Yovino v. Rizo*, No. 18-272 (U.S. Aug. 30, 2018).

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), bars employers from paying men and women performing substantially similar jobs in the same establishment different rates of pay, unless the employer can demonstrate that the pay differential is based on one of four specific affirmative defenses, including "any other factor other than sex." 29 U.S.C. § 206(d)(1). The Ninth Circuit below held that when an employer sets a new employee's starting pay pursuant to a compensation system that relies, in part, on the individual's prior salary, any resulting pay differential between men and women is not based on a "factor other than sex" – and thus is unlawful – under the EPA. That holding is incorrect. Since prior salary is facially nondiscriminatory, it falls squarely within the scope of the EPA's "factor other than sex" affirmative defense. Indeed, neither the EPA nor Title VII requires any employer to redress pay differentials that are caused by something other than its own discriminatory employment practices. Any suggestion to the contrary has no basis in the law.

A compensation system such as the County's, which was applied consistently to all employees—including Respondent's male comparators—provides a complete explanation for the disparity at issue, and that explanation is, on its face, a "factor other than sex." Like countless other employers, the County compensates its employees based on and within specified pay ranges. Under longstanding policy, where prior salary plus a nondiscretionary, automatic five percent increase did not place a new hire within the County's specified pay range, employees like Respondent were

provided an even greater increase to ensure that they were compensated within range.

Thus, the County's application of its compensation system (and the system itself) is nondiscriminatory, resulting in women sometimes earning less than men, but also men sometimes earning less than women. Whether reliance on prior salary caused any particular disparity is immaterial, as that factor is not, and cannot be, considered a proxy for sex.

The Ninth Circuit's decision below therefore rests on a legally flawed premise – that an employer has an affirmative obligation under the EPA to eliminate disparities in pay, even when those disparities are caused by gender-neutral compensation policies. In other words, the Ninth Circuit rests its holding on the notion that prior salary cannot be a "factor other than sex" because it perpetuates the effects of past discrimination and what is commonly known as the "gender wage gap."

While the existence of a persistent, global gender pay gap is undeniable, so too is the fact that there are numerous causes for the gap, and no research exists that can fully account for the disparity, much less isolate unlawful sex discrimination as the sole cause. Indeed, numerous legal and practical challenges would arise if employers were expected to make individual, gender-based compensation decisions designed to "cure" the national gender wage gap.

For those reasons, the decision below not only impermissibly conflicts with the EPA's plain text as interpreted by this Court and every other court of appeals to have considered the issue, but it also creates unwarranted uncertainty for employers nationwide as to the validity of their facially nondiscriminatory

compensation policies and systems. Review of the decision below is needed to provide a clear and consistent standard that both the courts and employers may follow in developing, evaluating, and implementing nondiscriminatory, gender-neutral compensation policies.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The Decision Below Conflicts With The Plain Text Of The Equal Pay Act, Which Provides That A Pay Differential Based On Any Factor Other Than Sex Is Lawful

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), prohibits employers from differentiating in pay based on sex. It provides:

> No employer having employees subject to any provisions of this section shall discriminate ... between employees *on the basis of sex* by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex.*

29 U.S.C. § 206(d)(1) (emphasis added). This Court has characterized the fourth affirmative defense as a "general catchall provision," *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), which "in essence 'authorizes' employers to differentiate in pay on the basis of ... *any* other factor other than sex, even though such differentiation might otherwise violate the Act." *County of Washington v. Gunther*, 452 U.S. 161, 169 (1981) (emphasis added).

As a number of courts have observed, the EPA's "any other factor" affirmative defense "embraces an almost limitless number of factors, so long as they do not involve sex." *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (citations omitted); *see also Taylor v. White*, 321 F.3d 710 (8th Cir. 2003). Indeed:

> On its face, the EPA does not suggest any limitations to the broad catch-all "factor other than sex" affirmative defense. The more specific factors that are enumerated—seniority systems, merit systems, and systems that measure earnings by quality or quantity of output—provide examples of the type of gender-neutral factors envisioned by the legislature. The legislative history supports a broad interpretation of the catch-all exception, listing examples of exceptions and expressly noting that the catch-all provision is necessary due to the impossibility of predicting and listing each and every exception. Given this facially broad exception, we are reluctant to establish any per se limitations to the "factor other than sex" exception by carving out specific, non-gender-based factors for exclusion from the exception.

Taylor, 321 F.3d at 717-18 (citation and footnote omitted).

Not only was the EPA's "any other factor" affirmative defense intended to apply broadly to any number of non-sex-based factors affecting pay, but Congress declined to qualify or place any limitations on the meaning of "any" in this context. It did not, for instance, limit application of the catchall defense only to "reasonable," "job-related," or otherwise "legitimate" non-sex factors. *See Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005) (comparing ADEA's "reasonable factors other than age" to EPA's "any other factor" affirmative defense).

The Ninth Circuit disagrees. In the decision below, it characterized the EPA's "any other factor" defense as *narrow* in scope, one that must be read in the context of the statute's three other enumerated defenses – all of which have some job-related purpose or function. Viewed in that context, the court concluded that prior salary, "whether considered alone or with other factors, is not *job related* and thus does not fall within an exception to the Act that allows employers to pay disparate wages" to men and women. Pet. App. 10a (emphasis added).

In essence, according to the Ninth Circuit, because prior salary "is not a legitimate measure of work experience, ability, performance, or any other job-related quality," Pet. App. 25a, relying on it as a justification for paying men and women different wages does not square with the EPA, because it perpetuates "the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end." Pet. App. 27a. In doing so, it adopted an interpretation of the "any other factor" affirmative defense that simply cannot be reconciled with the statute's plain text. *Amici* respectfully urge this Court to grant the petition, reverse the decision

below, and confirm that the plain text of the EPA does not place any restrictions on the application of the "any other factor" affirmative defense – other than the requirement that the factor in question be non-sex-based.

B. The Decision Below Is Inconsistent With This Court's Decision In *County of Washington v. Gunther*

In *County of Washington v. Gunther*, this Court held that the Bennett Amendment to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, incorporates the EPA's four affirmative defenses, including the defense for differentials based on "any other factor other than sex." 452 U.S. 161 168-70 (1981). The Court pointed out that whereas Title VII was designed not only to prohibit "'overt discrimination but also [to proscribe] practices that are fair in form, but discriminatory in operation,'" *id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)), the EPA "was designed differently, to *confine the application of the act to wage differentials attributable to sex discrimination*." 452 U.S. at 170 (citation and footnote omitted) (emphasis added). Accordingly, the EPA "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'" *Id.* (footnote omitted); *see also Corning Glass*, 417 U.S. at 195 ("Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry ... The solution adopted was quite simple in principle: to require that 'equal work will be rewarded by equal wages'") (citation omitted).

The Ninth Circuit takes pains to sidestep this Court's reasoning in *Gunther*, suggesting it merely "supports the concept of a catchall provision limited to job-related factors." Pet. App. 20a. Its interpretation is incorrect. While this Court observed in *Gunther* that an employer's *use* of any other factor other than sex to justify a pay differential must be "bona fide," 452 U.S. at 170, the Court did not suggest that the factor *itself* must be so. Accordingly, the Ninth Circuit's declaration that "[p]rior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act," Pet. App. 10a, has no basis in the EPA or this Court's precedents.

C. Every Court Of Appeals To Consider This Issue, Save The Ninth Circuit, Has Determined That Prior Salary Can Constitute A "Factor Other Than Sex" Under The Equal Pay Act

Both the Seventh and Eighth Circuits have held that differentials based on prior salary – in other words, "a difference in pay based on the difference in what employees were previously paid ..." *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) (citing *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005)) – constitutes a "factor other than sex" under the EPA. In *Taylor v. White*, the Eighth Circuit reasoned that "[o]n its face, the EPA does not suggest any limitations to the broad catch-all 'factor other than sex' affirmative defense." 321 F.3d at 717. The Court thus explicitly rejected the argument that because it may permit the "perpetuation of unequal wage structures," *id.*, use of prior salary should be precluded as a matter of law. *Id.* at 718. Rather, reliance on prior salary is simply

one of any number of factors that the courts must consider in evaluating the viability of the employer's affirmative defense. *See, e.g., Taylor*, 321 F.3d at 718 (holding that the risks of perpetuating a pay differential "simply highlight the need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay").

In contrast, the Tenth and Eleventh Circuits have held that while prior salary "can be considered in determining whether pay disparity is based on a factor other than sex ..., the EPA 'precludes an employer from relying *solely* upon a prior salary to justify pay disparity.'" *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (citation omitted) (emphasis added); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (employer's reliance on prior salary and experience justified a difference in pay). The Second and Sixth Circuits take a similar approach, permitting employers to assert the fourth affirmative defense where the factors used serve a legitimate business purpose. *See, e.g., Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (employer may assert a "factor other than sex" defense when the "differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue"); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006) (holding that a factor other than sex "does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason") (citing *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988)).

Thus, in the Seventh and Eighth Circuits, prior salary alone can constitute a "factor other than sex." In the Tenth and Eleventh Circuits, however, prior

salary may be used to justify a gender pay disparity, but only in conjunction with other factors. In the Second and Sixth Circuits, a "factor other than sex," which would include prior salary, must serve a legitimate business purpose. And now in the Ninth Circuit, under no circumstances is prior salary considered a "factor other than sex" under the EPA. Review by this Court is warranted to bring much needed clarity to this extremely important aspect of workplace compliance.

D. If Permitted To Stand, The Decision Below Will Have A Profound, Largely Negative, Impact On Employers Nationwide

1. Ensuring nondiscrimination in compensation does not require ensuring all employees are paid the same

The mere fact that a wage disparity exists between male and female employees does not, in itself, constitute an EPA violation. Rather, the Act obligates employers to ensure that pay decisions are made for nondiscriminatory reasons, in other words, without regard to sex; it does not require they ensure across-the-board pay parity between all men and all women. Indeed, the EPA is "not the 'Pay Everyone Exactly the Same Act.'" *Behm v. U.S.*, 68 Fed. Cl. 395, 405 (2005) (citations omitted). Yet according to the Ninth Circuit, "Allowing prior salary to justify a wage differential perpetuates [the message that women are not worth as much as men], entrenching in salary systems an obvious means of discrimination—the very discrimination that the Act was designed to prohibit and rectify." Pet. App. 28a.

In other words, the Ninth Circuit assumes that the sole cause of the gender pay gap is sex discrimination and, as a result, women's prior salaries *always* will be lower than similarly situated males because of sex. Accordingly, the argument goes, because prior salary is influenced by the gender pay gap, its use is always sex-based. Even assuming that some women's prior salaries are lower than that of similarly situated males consistent with the wage gap generally, it does not follow that use of prior salary itself is inherently discriminatory.

The Ninth Circuit's position would amount to a requirement that all employers eliminate any pay disparity between genders, even those created by a gender-neutral policy – a requirement that simply does not exist under the EPA. As this Court observed in *Smith v. City of Jackson*, "in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), Congress barred recovery if a pay differential was based 'on any other factor' – *reasonable or unreasonable* – 'other than sex.'" 544 U.S. 228, 239 n.11 (2005) (emphasis added).

Accordingly, any notion that employers must guarantee gender pay parity in the absence of any evidence of sex-based discrimination or face liability under the EPA should be soundly rejected by this Court. So too should any notion that employers nationwide must adopt gender-based or, at the very least, "gender-conscious," compensation systems designed to achieve pay parity, regardless of any evidence of actual sex-based discrimination. In fact, forcing employers to adjust pay based on sex where no evidence of actual discrimination exists could expose employers to claims that such adjustments themselves violate Title VII. *See Ricci v. DeStefano*, 557 U.S. 557, 585 (2009);

see also Rudebusch v. Hughes, 313 F.3d 506 (9th Cir. 2002).

In both discretionary and non-discretionary compensation systems, sound business and policy reasons can exist for assigning employees different compensation. Here, those reasons were a combination of prior salary and the County's mandatory pay scale. Sometimes that system resulted in women, such as Rizo, receiving less compensation than other males, and in other instances, females were paid more than males. In each instance, objective, nondiscriminatory reasons justified the pay decisions, and the County was under no obligation to "cure" any incidental pay differences stemming from prior salary. Such a notion runs directly counter to the principles of meritocracy that form the basis of most private sector employer compensation practices in the U.S. and should be squarely rejected by this Court.

2. The Equal Pay Act does not impose an affirmative obligation on employers to identify or "cure" the effects of the gender wage gap

According to the Ninth Circuit, the use of prior salary will "allow employers to capitalize on the persistence of the wage gap[, which] would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands." Pet. App. 3a. Not only is there no affirmative obligation on employers under the EPA to "cure" the effects of the gender pay gap, but the Ninth Circuit's assumption that sex discrimination "explains" the gender pay gap is unfounded. While the existence of a persistent, global gender pay gap is undeniable, so too is the fact that there are numerous causes for the gap, and no research exists that can fully account for the

disparity, much less pin the entire disparity on unlawful sex discrimination.

For example, in January 2009 the CONSAD Research Corporation released a report commissioned by the Department of Labor entitled, *An Analysis of Reasons for the Disparity in Wages Between Men and Women*,[2] aimed at researching and quantifying the cause of the gender wage gap. The study identified numerous factors that contributed to the gap, including career choice in occupation and industry, employment interruptions mid-career, and different decisions made by men and women in balancing their work, personal, and family lives. After conducting a statistical analysis of these and other factors, an "adjusted gender wage gap" remained, estimated between 4.8 and 7.1 percent. *Id.* at 1. Other studies have produced similar results. *See, e.g.*, Christianne Corbett, M.A. & Catherine Hill, Ph.D, Am. Ass'n of Univ. Women, *Graduating to a Pay Gap* vii (Oct. 2012)[3] (concluding that "women's choices—college major, occupation, hours at work—do account for part of the pay gap[, but also that] about one-third of the gap remains unexplained" and may be the product of other factors such as negotiations and even discrimination) (quoting Foreward by Carolyn H. Garfein, AAUW President & Linda D. Hallman, CAE, AAUW Executive Director); Dr. Andrew Chamberlain, Chief Economist, Glassdoor, *Demystifying the Gender Pay Gap* 18 (Mar.

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[2] *Available at* https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/Gender%20Wage%20Gap%20Final%20Report.pdf (last visited Oct. 3, 2018).

[3] *Available at* https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf (last visited Oct. 3, 2018).

2016)[4] (concluding that the U.S. adjusted wage gap was 5.4% in base compensation and 7.4% in total compensation, after controlling for factors such as industry, experience, education and job title).

The "adjusted gender wage gap," is what remains of the wage gap once quantifiable characteristics such as occupation, industry, experience, and other factors are controlled for in statistical studies. Also referred to as the "unexplained" wage gap, some suggest that this unexplained gap is caused by unlawful discrimination. While there is no question that unlawful, gender-based discrimination *may* account for portions of the adjusted gender wage gap, the fact remains that no research to date has been able to quantify which portion of the gap is attributable to discrimination. More importantly, the EPA simply does not impose an obligation on employers to become social scientists and make individual, gender-based compensation decisions based on the latest research regarding the existence of a wage gap and the degree to which this gap *may* be the product of discrimination.

Employers are not obligated under any federal law to equalize their employees' starting pay to ensure perfect parity between people performing the same job. Ensuring perfect parity in compensation among all employees in a particular job group would require, for instance, that every person promoted into a job be compensated at the same rate of pay as the highest earner (likely the most experienced or best performer), thus disregarding differences in skills, knowledge, ability and/or time in job. Alternatively, employers

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[4] *Available at* https://www.glassdoor.com/research/app/uploads/sites/2/2016/03/Glassdoor-Gender-Pay-Gap-Study.pdf (last visited Oct. 3, 2018).

would resort to compensating every employee at the *lowest* wage without regard to merit.

The former would increase payroll budgets exponentially, while the latter would severely impede efforts to attract the best talent and produce the highest quality product, thus ensuring a quick race to the bottom, rather than to the top. Under either scenario, American businesses would be placed at a significant and extremely damaging competitive disadvantage.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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